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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. STEVEN MICHAEL TOLAGIAN, Appellant.	2 CA-CR 2007-0099 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20061477

Honorable Richard S. Fields, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Cassie Bray Woo — Phoenix
Attorneys for Appellee

Jack L. Lansdale, Jr. — Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, appellant Steven Tolagian was convicted of one count of aggravated driving under the influence of an intoxicant (DUI) with a suspended or revoked

driver's license and one count of aggravated driving with a blood alcohol concentration (BAC) of .08 or more with a suspended or revoked driver's license, both class four felonies. The trial court sentenced him to prison for concurrent, mitigated terms of 1.25 years on each count. On appeal, Tolagian argues there was insufficient evidence to sustain the jury's finding that he knew or should have known his license was suspended when he was arrested.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury verdicts and resolve all reasonable inferences against the appellant. *See State v. Greene*, 192 Ariz. 431, ¶ 12, 967 P.2d 106, 111 (1998). On September 23, 2005, Marana Police Officer William Dittiger saw two vehicles traveling relatively close together. He observed that the front vehicle had a "constant sway to it" and it moved into the bike lane twice. The officer passed the second vehicle and positioned himself directly behind the first. After following it for a quarter mile and observing that the driver was weaving in and out of his lane, Dittiger initiated a traffic stop.

¶3 When he approached the driver of the vehicle, Tolagian, Dittiger noticed he displayed signs of intoxication including "a slight odor of intoxicating beverages." Dittiger asked if he had been drinking, and Tolagian admitted he had. Dittiger also noted Tolagian had bloodshot, watery eyes; slurred speech; and a slight sway when he stepped out of the car.

¶4 After Tolagian agreed to perform field sobriety tests, Officer Joshua Everhart arrived and conducted a horizontal gaze nystagmus test, on which Tolagian exhibited four

of a possible six cues of impairment. On a walk-and-turn test, Tolagian exhibited four of eight possible cues and, on the one-leg stand, three of four cues.

¶5 A records check indicated Tolagian's driver's license was suspended. Asked if he knew of the suspension, Tolagian said, "I have no idea." He was then placed under arrest. After Dittiger read Tolagian the implied consent affidavit, he agreed to submit to a blood test, and Everhart performed a blood draw at the scene. The test results reflected a BAC of .150.

¶6 Evidence at trial showed Tolagian's driver's license had been suspended as the result of a previous DUI arrest in July 2005. Tolagian and the state stipulated that he had not been personally served with notice of the suspension in July. However, his Arizona driving record admitted into evidence indicated he had been read the implied consent affidavit at that time. He had thus been informed that his license would automatically be suspended for ninety days if his BAC was .08 or more; the result of his blood test on that occasion had revealed a BAC of .189. On August 3, 2005, a notice of suspension had been mailed to Tolagian's address of record in compliance with the notice requirements of A.R.S. § 28-3318. The suspension took effect on September 19, 2005.

¶7 At trial, Tolagian testified he had not received notice of the suspension and was unaware of it until after he was arrested in this case. He further stated he had tried twice prior to September 23, 2005, to notify the Arizona Motor Vehicle Department (MVD) of his changed address by using the MVD's Internet website. MVD records introduced in evidence showed Tolagian changed both his mailing address and street address of record on

September 24, 2005. At the conclusion of the state's case, the court denied Tolagian's motion pursuant to Rule 20, Ariz. R. Crim. P., for a judgment of acquittal.

Notice by MVD

¶8 Tolagian first contends the trial court erred in denying his Rule 20 motion. We review that ruling for an abuse of discretion and will reverse only if no substantial evidence supports the conviction. *See State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003). Substantial evidence is proof that "reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Sharma*, 216 Ariz. 292, ¶ 7, 165 P.3d 693, 695 (App. 2007). To set aside a verdict on the basis of insufficient evidence, "it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). We do not reweigh the evidence to decide if we would have reached the same result as the trier of fact. *See State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995).

¶9 To establish the offense of aggravated DUI pursuant to A.R.S. § 28-1383(A)(1), the state must prove beyond a reasonable doubt that the defendant was driving while impaired or with a BAC of .08 or greater, that the defendant's driver's license was suspended at the time, and that the defendant "knew or should have known" of the suspension. *State v. Rivera*, 177 Ariz. 476, 479, 868 P.2d 1059, 1062 (App. 1994). Only the third element, Tolagian's knowledge that his license was suspended, is at issue here.

¶10 "In Arizona, a license to operate a motor vehicle is a privilege subject to legislative mandate." *State v. Cifelli*, 214 Ariz. 524, ¶ 16, 155 P.3d 363, 367 (App. 2007); *accord State v. Cabrera*, 202 Ariz. 296, ¶ 13, 44 P.3d 174, 177 (App. 2002). As a condition of that privilege, A.R.S. § 28-448(A) requires a licensee to notify the MVD of any change of address within ten days of moving. Section 28-3318 (C) and (E), A.R.S., provide that written notice of suspension mailed to the last address on record for the licensee constitutes notice of suspension. The state is not required to prove actual receipt of the notice or actual knowledge of the suspension, and notice is complete upon mailing. § 28-3318 (E), (D). Once the state proves the notice was mailed, the licensee is presumed to have received the notice and to have known his license was suspended. *See State v. Church*, 175 Ariz. 104, 108, 854 P.2d 137, 141 (App. 1993); *see also State v. Jennings*, 150 Ariz. 90, 94, 722 P.2d 258, 262 (1986). While this presumption is rebuttable, to do so a defendant bears the burden of establishing he did not receive actual notice. *See Church*, 175 Ariz. at 108, 854 P.2d at 141; *see also Cifelli*, 214 Ariz. 524, ¶ 13, 155 P.3d at 366. Tolagian argues he overcame this burden when he testified that he did not know on September 23, 2005, that his license had been suspended and that he had attempted to notify the MVD of his change of address. We disagree.

¶11 The record reflects a notice of suspension was mailed on August 3, 2005, to Tolagian's address of record in compliance with the requirements of § 28-3318. Tolagian's assertion that he did not receive the mailed notice does not automatically rebut the presumption of knowledge. Tolagian had an affirmative duty to notify the MVD of his

change of address within ten days; it was therefore incumbent on him to submit additional evidence that he never received actual notice to successfully rebut the statutory presumption. *See Cifelli*, 214 Ariz. 524, ¶ 14, 155 P.3d at 366 (presumption of notice rebutted "directly and through other evidence" including document indicating date upon which mail ceased to be forwarded from defendant's post office box). Tolagian submitted no evidence showing he was no longer receiving any mail sent to the address of record, or the dates of his two purported attempts to change his address, and reasonable jurors could find he failed to carry his burden. We defer to the jury's assessment of the credibility of witnesses and the weight to be given to their testimony. *See State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974).

Constructive Knowledge

¶12 Tolagian also contends the state failed to establish by substantial evidence that he had "reason to know" of his license suspension. In *Cifelli*, Division One of this court held that, if a defendant successfully rebuts the presumption of notice with evidence of nonreceipt, the state may not overcome the absence of actual knowledge merely by showing notice was mailed to the last known address. 214 Ariz. 524, ¶ 20, 155 P.3d at 368. Instead, to prove the defendant had constructive notice, the state must submit evidence demonstrating "a level of deliberate ignorance regarding the status of his license that is the substantial equivalent of having reason to know that his license was suspended." *Id.* This heightened evidentiary standard, however, is only applicable after a defendant successfully demonstrates nonreceipt and does not affect the statutory presumption of notice upon mailing. *See id*. Tolagian

offered no evidence beyond his bare denial that he had received notice. Thus, as we have already noted, the jury could find on this record that he failed to meet his burden of rebutting the presumption of lack of actual notice. And, in any event, the state introduced evidence showing Tolagian had reason to know his license would be suspended as a result of having been read the implied consent affidavit in July 2005. Accordingly, we need not further examine this issue.

Disposition

¶13 Tolagian's convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge